

**2021 OVERSEAS LAWYERS  
QUALIFICATION EXAMINATION**

**HEAD II: CIVIL AND  
CRIMINAL PROCEDURE**

Friday, 5 November 2021





# 2021 Overseas Lawyers Qualification Examination

## Head II: Civil and Criminal Procedure

### Question 1 (25 marks)

#### Part A

Abel, Cain and Zach are all fresh graduates of the University of Hong Kong having just passed the Postgraduate Certificate in Laws course. They decided to have a night out to celebrate their success in Central, Hong Kong. Having visited several bars in Lan Kwai Fong, they became intoxicated with alcohol. At one point, Cain and Zach decided to go home and sleep their drunkenness off. Abel was left alone in a bar.

At 2:00 am, Abel prepared to leave the bar, having got the impression that the final bar tab had been settled by either Cain or Zach. He was stopped by Jim, the manager, at the door, as the bill was not paid. Jim told Abel the bill was for HK\$3,000. Abel had spent all his cash at the previous establishments and did not have any credit cards. Abel explained to Jim that it was common practice for the bar tabs to be divided between him and his friends, Cain and Zach. He was prepared to settle his share of the bar bill for HK\$1,000, only Abel had no cash and needed to visit an automatic teller machine to get more. Jim would not let Abel leave. Abel tried several times to telephone Cain and Zach but neither answered his calls.

In desperation, Abel tried to push past Jim, kicking into chairs and a table as he went. A waiter, Bill, saw what was happening and tried to assist Jim. Feeling threatened by the men, Abel picked up an empty beer bottle and struck Bill with it to the head, causing him to bleed.

*(See over the page for a continuation of Question 1)*

Police were called and Abel was arrested and taken back to the police station where he was allowed to sober up before interview. The next morning, when Abel had sobered up, he cried and told the police, under caution, that he did not recall any of the previous night's events.

Abel was subsequently charged with:

- Criminal damage to the table and chairs, contrary to section 60, in Part VIII of the Crimes Ordinance, Cap. 200.
- Making off without payment for the drinks contrary to section 18C of the Theft Ordinance, Cap 210.
- Assault occasioning actual bodily harm against Bill, contrary to section 39 of the Offences Against the Person Ordinance, Cap 212.

All three offence sections are attached below.

### **Question:**

(1) You represent Abel. **Advise him where his case is likely to be tried.**

**(13 marks)**

### Part B

You have recently learned that all three students, Abel, Cain and Zach are members of the Student's Union of the University of Hong Kong and took part in actions which are alleged to have contravened the National Security Law ("NSL"). As such, all three students were subsequently arrested and charged with an offence against the NSL.

*(See the next page for a continuation of Question 1)*

**Question:**

**(2) What is the prospect of the students obtaining bail pre-trial?**

**(12 marks)**

**[25 marks in total]**

**Attachment**

***Crimes Ordinance, Cap 200, Part VIII Criminal Damage to Property***

***Section 60. Destroying or damaging property***

- (1) *A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence.*
- (2) *A person who without lawful excuse destroys or damages any property, whether belonging to himself or another—*
- (a) *intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and*
- (b) *intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered,*
- shall be guilty of an offence.*
- (3) *An offence committed under this section by destroying or damaging property by fire shall be charged as arson.*

***(See over the page for a continuation of Question 1)***

### **Section 63. Punishment of offences**

- (1) *A person guilty of arson under section 60 or of an offence under section 60(2) (whether arson or not) shall be liable on conviction upon indictment to imprisonment for life.*
- (2) *A person guilty of any other offence under this Part shall be liable on conviction upon indictment to imprisonment for 10 years.*

### **Theft Ordinance, Cap 210**

#### **Section 18C. Making off without payment**

- (1) *Subject to subsection (3), a person who, knowing that payment on the spot for any goods supplied or service done is required or expected from him, dishonestly makes off without having paid as required or expected and with intent to avoid payment of the amount due shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 3 years.*
- (2) *For the purposes of this section **payment on the spot** includes payment at the time of collecting goods on which work has been done or in respect of which service has been provided.*
- (3) *Subsection (1) shall not apply where the supply of the goods or the doing of the service is contrary to law, or where the service done is such that payment is not legally enforceable.*

### **Offences Against the Person Ordinance, Cap 212.**

#### **Section 39. Assault occasioning actual bodily harm**

*Any person who is convicted of an assault occasioning actual bodily harm shall be guilty of an offence triable upon indictment, and shall be liable to imprisonment for 3 years.*

## Question 2 (25 marks)

Your client, an 18-year old Chinese national, has been charged with one count of trafficking in a dangerous drug, namely 1 kilogramme of a crystalline solid containing 0.9 kg of methamphetamine hydrochloride (known as ice). He was intercepted at the Hong Kong airport after attempting to board a plane destined for Auckland, New Zealand with the drugs in his bag.

The drugs were found inside a gaming console. They were wrapped inside plastic bags and inserted into the console's main cavity. None of the bags were marked with fingerprints, however one of the bags showed DNA material which may have come from the defendant.

On arrest, the defendant denied knowledge of the drugs. He agreed, however, that he knew that there was a powder inside the console. In a video-recorded interview with the police, he claimed he had been asked by a friend to carry the powder inside the console to his friend's grandmother who lives in New Zealand. The powder, he believed, was a kind of legal traditional Chinese medicine. His friend said it was better to carry it in a concealed way to avoid unnecessary questions and delay by ignorant border patrol officers in New Zealand. After his interview, he produced to you a series of email messages on his laptop showing that he had been told by his friend repeatedly that the console contained nothing illegal.

The prosecution's case relies on the presumption of knowledge in section 47 of the Dangerous Drugs Ordinance Cap 134, which states:

*(See over the page for a continuation of Question 2)*

**“47. Presumption of possession and knowledge of dangerous drug**

- (1) *Any person who is proved to have had in his physical possession—*
- (a) *anything containing or supporting a dangerous drug;*
  - (b) *the keys of any baggage, briefcase, box, case, cupboard, drawer, safe-deposit box, safe or other similar container containing a dangerous drug,*
- shall, until the contrary is proved, be presumed to have had such drug in his possession.*
- (2) *Any person who is proved or presumed to have had a dangerous drug in his possession shall, until the contrary is proved, be presumed to have known the nature of such drug.*
- (3) *The presumptions provided for in this section shall not be rebutted by proof that the defendant never had physical possession of the dangerous drug.”*

The defendant wishes to rely on the email messages to defend himself at trial.

**Question:**

- (1) **Assuming your client is permitted to rely on the messages as part of his defence, what direction would the trial judge need to give the jury on the use of the evidence in determining the guilt or innocence of your client?**

**(12 marks)**

*(See the next page for a continuation of Question 2)*



The trial has now begun. At the close of the prosecution's case, the case against your client relied on his possession of the drugs (inside the console), and the possible DNA match on one of the plastic bags containing the drugs. No other evidence against him was offered.

**Question:**

- (2) Prior to commencing the defence case before the jury, what application would you make to the trial judge?

**(13 marks)**

**[25 marks in total]**

### **Question 3 (25 marks)**

Raymond Chen (“Mr. Chen”) is a wealthy businessman. Mr. Chen lives in Taiwan but travels to Hong Kong from time to time for business matters.

During a visit to Hong Kong in early January 2020, Mr. Chen met up with one of his long-term business partners, Mr. Henry Lau (“Mr. Lau”), who conducts his business through “Lau Trading Company Limited”, a company incorporated in Hong Kong of which Mr. Lau is the sole shareholder and one of the directors.

At the meeting, Mr. Lau told Mr. Chen that his business was not going well lately and that he was having some cash flow problems because a number of his customers have delayed in settling payments due to Mr. Lau, and in turn, Mr. Lau was unable to settle payments owed to his suppliers.

Mr. Lau mentioned that he needed around HK\$4 million to pay off outstanding business expenses in particular the payments due to his suppliers who had already threatened to sue him if they did not get paid soon.

Mr. Chen wanted to help his long-term business partner and offered to lend the money to Mr. Lau. Mr. Chen informed Mr. Lau that he would need a few days to make some financial arrangements, after which he will then have the cash available to lend to Mr. Lau.

Mr. Chen has a bank account in Hong Kong which he uses to settle business costs and expenses in HKD currency, such as payments due to his clients/customers in Hong Kong, when necessary. Mr. Chen does not maintain a large amount of money in the Hong Kong bank account and only puts in funds when needed.

*(See the next page for a continuation of Question 3)*

After the meeting, Mr. Chen and Mr. Lau had a number of follow up discussions over the phone regarding the details of the intended loan to Mr. Lau. Mr. Chen also arranged to transfer money into the bank account in Hong Kong for the purpose of the intended loan to Mr. Lau.

Mr. Chen and Mr. Lau met again on 25<sup>th</sup> January 2020. At the meeting, Mr. Chen and Mr. Lau signed an agreement containing, inter alia, the following terms:

*“This Agreement is made on 25<sup>th</sup> of January 2020 between*

*Raymond Chen of 1 Tao Yuen Road, Taipei, Taiwan (“Lender”); and*

*Mr. Henry Lau of 23<sup>rd</sup> Floor, Lucky Building, Kowloon Bay, Hong Kong (“Borrower”)*

...

- 1. The Lender agrees to lend the sum of HK\$4 million (“the Loan”) by way of a personal loan to the Borrower on or before 31<sup>st</sup> January 2020.*
- 2. The Borrower shall pay interest on the outstanding principal amount of the Loan at the rate of 4% per annum which shall accrue from 31<sup>st</sup> January 2020 until full repayment of the Loan by the Borrower to the Lender.*
- 3. Subject to any further agreement between the Lender and the Borrower, the Borrower shall repay the Loan in full to the Lender by 31<sup>st</sup> January 2021 (“Repayment Date”) together with all unpaid accrued interest due under this Agreement. The Borrower may repay all or part of the Loan at any time prior to the Repayment Date.*

***(See over the page for a continuation of Question 3)***

....

*16. This Agreement is subject to Hong Kong Law and any disputes shall be determined by the Hong Kong Courts.”*

Mr. Chen issued a cheque for HK\$2 million in favour of Mr. Lau, which he passed to Mr. Lau during the meeting, as part of the HK\$4 million loan. Mr. Chen told Mr. Lau that he would transfer the remaining HK\$2 million loan to him within the next few days. Mr. Lau subsequently deposited the cheque, which was duly cleared by the bank, and Mr. Chen also transferred the remaining HK\$2 million loan to Mr. Lau’s bank account in Hong Kong on 31<sup>st</sup> January 2020.

Mr. Chen returned to Taiwan in February 2020. Towards the end of 2020, Mr. Lau contacted Mr. Chen via instant messaging and the following exchanges took place:

*“28<sup>th</sup> December 2020*

*Henry Lau:*

*Hi Raymond, trust everything is going well and you are staying safe and healthy. Regarding the 4 mil loan, I would need some further time to arrange repayment to you.*

*Raymond Chen:*

*Thanks Henry and yes I am doing well. I am generally okay to give you further time to repay, but can you give me an idea how long you need?*

*Henry Lau:*

*A few more months, but perhaps to stay safe, I would say by 31<sup>st</sup> August 2021, and I am pretty confident that I will be able to repay the loan to you by then and I will honour the payment of interest due as per the loan agreement we signed back in January.*

***(See the next page for a continuation of Question 3)***

*Raymond Chen:*

*Ok Henry, I can agree to extend the repayment deadline to 31<sup>st</sup> August 2021.*

*Henry Lau:*

*Many thanks Henry for agreeing to this.”*

On 18<sup>th</sup> April 2021, Mr. Chen received an instant message from Mr. Lau, stating “*Hi Raymond, I have today transferred HK\$500,000 to you as partial repayment of the HK\$ 4mil loan. Please check for receipt*”. On the same day, Mr. Chen responded to Mr. Lau, stating, “*Thanks, Henry. I confirm receipt of the HK\$500,000 you mentioned*”.

Mr. Chen has received no further payment from Mr. Lau in respect of the HK\$ 4 million loan by the repayment date, and despite having sent a number of messages to Mr. Lau to enquire about the status, Mr. Lau did not provide any response to Mr. Chen.

Mr. Chen has recently returned to Hong Kong for business, and using the occasion, he has approached you and your firm seeking advice on recovery of the outstanding loan from Mr. Lau.

### **Questions:**

- (1) Explain what formal legal proceedings can be taken against Mr. Lau, how they can be commenced, and whether there are any issues which Mr. Chen needs to be aware of if he is to commence legal proceedings in Hong Kong against Mr. Lau.**

**(4 marks)**

*(See over the page for a continuation of Question 3)*

- (2) Your firm, acting on behalf of Mr. Chen as the Plaintiff, has commenced legal proceedings against Mr. Lau. **Draft the necessary pleading (including headings and name of parties) required for the purpose of pursuing the formal legal proceedings against Mr. Lau. The pleading must include the necessary components to comply with any necessary procedural requirements of the Rules of Court. You may assume and state in the pleading any facts (including dates) not inconsistent with the facts/information as provided in this question which you consider are necessary for the purpose of drafting the pleading.**

**(15 marks)**

- (3) Mr. Lau appointed a firm of solicitors to represent him as the Defendant in the legal proceedings. Mr. Lau's solicitors subsequently served a pleading containing, inter alia, the following allegation:

“ ...

6. *It was agreed that Lau Trading Company Limited would be liable to repay the loan to the Plaintiff*

... ”

Mr. Chen has instructed you he has no recollection or any information relating to the above alleged agreement.

*(See the next page for a continuation of Question 3)*

**Explain:**

- (i) What would be the most appropriate procedural step that Mr. Chen/Plaintiff can take if he wants to seek additional information from Mr. Lau/Defendant in respect of the above allegation;**
  
- (ii) Based on your answer to (3)(i) above, draft the appropriate wording setting out the additional information which you (on behalf of Mr. Chen/Plaintiff) intend to seek from Mr. Lau/Defendant in respect of the above allegation.**

**(6 marks)**

**[25 marks in total]**

#### **Question 4 (25 marks)**

Your firm acts for Mr. Wong Ming San (Mr. Wong) who carries on business through his company, WMS Contractors Limited (WMS Ltd), renovating residential properties in Hong Kong.

Mr. Wong has instructed your firm with regard to legal proceedings which have been brought against him. His initial instructions are as follows:

Mr. Wong was approached by Top Peak Landlord Limited (Top Peak) to renovate a house owned by it at Papaya Garden, The Peak. The agreed price was HK\$6 million. A standard form WMS Ltd contract was signed by both parties, with an addendum, added by Top Peak, providing that if for any reason the renovation works could not be completed by 30 June 2021, Top Peak had the right to terminate the contract and would not be liable for any sum thereunder. Mr. Wong did not seek legal advice when entering into this contract.

Because of material and manpower shortages during the Covid 19 pandemic, the renovations could not be completed by 30 June 2021. Top Peak terminated the contract and demanded repayment of HK\$2,500,000, being the amount of work-in-progress payments it had made. Top Peak also threatened to sue for damages resulting from the loss of rental income. After some discussions between Mr. Wong and Top Peak, it was agreed that the HK\$2,500,000 would be refunded on condition that Top Peak would waive its threatened claim for damages. This settlement agreement was purely oral.

Mr. Wong then issued a cheque for HK\$2,500,000 in favour of Top Peak and handed it over.

*(See the next page for a continuation of Question 4)*



Later the same day Mr. Wong realised that he had used the wrong cheque book, that he should have drawn the settlement cheque on the account of WMS Ltd rather than on his personal account. First thing the next morning Mr. Wong instructed his bank to countermand the personal cheque. As a result the personal cheque was dishonoured by the bank on presentation.

Before Mr. Wong had an opportunity to discuss the matter with Top Peak, or consult solicitors, he was served with a writ, naming him as sole defendant. The writ was indorsed with a statement of claim seeking judgment for HK\$2,500,000, being the amount of the dishonoured cheque, plus interest and costs.

Your firm was then instructed, and you filed and served notice of intention to defend.

Before you had the time to file a Defence, your firm, as solicitors for Mr. Wong, was served with a summons and affirmation seeking summary judgment under Order 14.

The statement of claim is very short. It deals only with the cheque issued by Mr. Wong, and its dishonour, without mention of any of the background facts. The affidavit in support of the O 14 application verifies the statement of claim and produces a copy of the cheque, with the bank's "refer to drawer" notice as an exhibit.

Mr. Wong's instructions are that he is a simple man, born in the Mainland, able to understand only limited English; that he did not understand the addendum Top Peak inserted into the contract, and that he made a genuine mistake in issuing the cheque on his personal account. He wishes to protect his own personal assets, which consist largely of the flat where he and his family live, as well as his life savings in his personal bank account.

*(See over the page for a continuation of Question 4)*

In the meantime WMS Ltd has become insolvent, as a result of the downturn in business and disputes with other clients. A winding-up petition has been issued against it, meaning that it is not in a position to pay any part of the HK\$2,500,000 owing to Top Peak.

A senior member of your firm has suggested that Mr. Wong may have a defence on the basis of total failure of consideration, since the written renovation contract was expressly stated to be between Top Peak and WMS Ltd. For the purpose of this question, you may assume that this suggestion is correct, or at least arguable.

**Questions:**

- (1) Prepare brief notes for your supervising partner to use in a forthcoming meeting with Mr. Wong to seek his further instructions. Your notes should set out (briefly):**
- (a) the nature of an O 14 application;**
  - (b) the consequences if the O 14 application is not opposed, or not opposed successfully;**
  - (c) what Mr. Wong could do to oppose the application, should he wish to do so;**
  - (d) whether Mr. Wong's personal assets could be at risk.**

**Your brief notes may be in point form.**

**(10 marks)**

*(See the next page for a continuation of Question 4)*

**(2) Prepare a draft affirmation in opposition to the O 14 application. You should include the full heading and the full names of the parties. You should also include the necessary formal parts. If you choose to exhibit documentary evidence, you may do so simply by referring to it in the body of the affirmation without actually writing down the contents of the exhibit itself. For extra credit, you may add footnotes explaining any part of your draft.**

**(15 marks)**

**[25 marks in total]**

### **Question 5 (25 marks)**

You act for Mr. Xyllius Yung. Mr. Yung's was head of research in Hong Kong for Advanced Bio-Tech Corp, a Mainland Chinese bio-tech company, until his employment was terminated in 2017 with payment in lieu of notice following an internal investigation and disciplinary process, including an appeal, which ultimately found that, whilst he was not guilty of either dishonesty or recklessness, he had committed a serious error of judgement in his managerial responsibilities, including lack of control over subordinates. The date of termination was one month before the vesting date of various stock options granted to him under Advanced Bio-Tech Corp's employee incentive plan. Mr. Yung claims in his Hong Kong High Court action that the termination of his employment was in bad faith: other managers had an equal or larger responsibility for supervising the subordinates in question, but no disciplinary action was taken against them; and the primary motivation for terminating his employment was to deprive him of the benefit of the stock options. He claims damages of HKD 50 million, together with interest. In a second claim in the same action, Mr. Yung seeks an injunction restraining Advanced Bio-Tech Corp from continuing one line of research which he has claimed is dependent on the use of certain bio-tech patents, the licence for which was only granted in favour of Advanced Bio-Tech Corp for the duration of his employment and six months thereafter. Advanced Bio-Tech Corp is defending the patent infringement counterclaim on various grounds, including in particular that the line of research it is conducting does not involve any infringement of the patents. In addition to permanent injunctive relief, Mr. Yung also seeks damages for infringement based on a fair market value of the patent. There is no interim injunction in place.

*(See the next page for a continuation of Question 5)*

## Part A

The trial is scheduled for 15 days commencing on Monday, 28 February 2022. The trial will deal only with liability in relation to Mr. Yung's patent infringement claim, and not quantum. Both sides have submitted reports on behalf of an independent expert in relation to the patent infringement claim, addressing the question of whether there has been any infringement. Mr. Yung was able to find a suitable expert witness in Hong Kong. Advanced Bio-Tech Corp has served and filed 6 witness statements: the two internal audit officers who conducted the internal investigation; two out of the three members of the disciplinary review committee that first heard his case; and two out of three of the members of the disciplinary appeal committee that heard Mr. Yung's unsuccessful appeal from the decision of the disciplinary review committee.

The Pre-Trial Review is scheduled for hearing for 1 hour on Friday, 3 December 2021 before the trial Judge.

### **Questions:**

- (1) You have just received a letter from Advanced Bio-Tech Corp's solicitors requesting that the plaintiff consents to leave for all six of its factual witnesses to give evidence by way of video-conferencing facilities in 5 different locations – two from Singapore; one from Dubai; one from Paris; one from London and one from New York on the basis that, in the light of the Covid-19 situation, there is a real likelihood of it not being feasible for them to travel to Hong Kong to give evidence, and none of them is willing to risk doing so in the present circumstances. You know that Mr. Yung was very hopeful the witnesses would be cross-examined in person, given the allegations of bad faith made by him.

*(See over the page for a continuation of Question 5)*

**Draft a suitable letter of advice to Mr. Yung explaining to him: (i) how the High Court would normally (in the absence of Covid-19) consider such an application for leave for evidence to be given by witnesses by video-conference, (ii) how the High Court may consider the Defendant's application for leave given Covid-19, and (iii) what procedural steps would be involved in the Defendant making an application for leave.**

**(7 marks)**

- (2) Mr. Yung's expert witness has indicated some reluctance to Mr. Yung to give evidence at the trial – the expert appears to be getting “cold feet”. What steps would you take to protect your client's position?**

**(5 marks)**

Part B

Following the trial, a written judgment is handed down dismissing Mr. Yung's first claim, but allowing his second patent infringement, subject to calculation of damages. The judgment does not deal with any aspect of the costs of the proceedings. The judgment contains a direction for a hearing to be scheduled to take place within 4 weeks of the date of the judgment for the purpose of (i) hearing the parties on questions of costs, and (ii) giving directions for the trial on quantum of the patent infringement claim.

*(See the next page for a continuation of Question 5)*

**Questions:**

- (3) Describe in outline the procedure if either Advanced Bio-Tech Corp or Mr. Yung wishes to appeal against the part of the judgment that they respectively lost.

(6 marks)

- (4) On behalf of Mr. Yung, what directions should be sought in respect of the outstanding trial on quantum and what arguments should be made in respect of the costs of the action to date?

(7 marks)

[25 marks in total]

**END OF TEST PAPER**